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SENATE

REPORT
93-

AMENDING THE FREEDOM OF INFORMATION ACT

FEBRUARY —, 1974

Mr. KENNEDY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2543]

The Committee on the Judiciary, to which was referred the bill (S. 2543) to amend section 552 of title 5, commonly known as the Freedom of Information Act, having considered the same, reports favorably thereon, with amendments, and recommends that the bill do pass.

PURPOSE

S. 2543 would amend the Freedom of Information Act (FOIA) to facilitate freer and more expeditious public access to government information, to encourage more faithful compliance with the terms and objectives of the FOIA, to strengthen the citizen's remedy against agencies and officials who violate the Act, and to provide for closer congressional oversight of agency performance under the Act.

The committee recognizes that the meaning of the substantive exemptions in subsection (b) of the FOIA has been subject to conflicting interpretations and may not be altogether clear, but the committee has concluded that the primary obstacles to the Act's faithful implementation by the executive branch have been procedural rather than substantive. For this reason S. 2543 does not amend the substance of the exceptions to disclosure spelled out in subsection (b) of section 552, which have been clarified substantially through numerous reported court decisions.

AMENDMENTS

Amendment No. 1. On page 2, line 13, following the word "shall" delete all through line 14 and insert in lieu thereof the following:

> "be limited to reasonable standard charges for document search and duplication and provide recovery of only the direct costs of search and duplication."

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Amendment No. 2. On page 4, line 7, following "prevailed" add the following:

> "In exercising its discretion under this paragraph, the court shall consider the benefit to the public, if any, deriving from the case, the commercial benefit to the complainant and the nature of his interest in the records sought, and whether the government's withholding of the records sought had a reasonable basis in law."

Amendment No. 3. On page 4, line 8, delete all through line 16 and insert in lieu thereof the following:

> "(F) Whenever records are ordered by the court to be made available under this section, the court shall on motion by the complainant find whether the withholding of such records was without reasonable basis in law and which federal officer or employee was responsible for the withholding. Before such findings are made, any officers or employees named in the complainant's motion shall be personally served a copy of such motion and shall have 20 days in which to respond thereto, and shall be afforded an opportunity to be heard by the court. If such findings are made, the court shall direct that the appropriate official of the agency which employs such responsible officer or employee suspend him without pay for a period of not less than 10 nor more than 60 days."

Amendment No. 4. On page 6, between lines 8 and 9, insert the following new subsection:

> (b) Section 552(b) of title 5, United States Code, is amended by striking out "files" in clauses (6) and (7) therein and inserting in lieu thereof "records".

Amendment No. 5. On page 6, delete lines 9 through 16 and insert in lieu thereof the following:

> (c) Section 552(b) of title 5, United States Code, is amended by adding at the end the following: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

PURPOSE OF AMENDMENTS

Amendment No. 1. This change clarifies the requirements for the establishment of fees to be charged for services performed in response to a request for information, providing that they should be reasonable, standard for all agencies, limited to search and duplication costs and based on only the direct costs to the government for these services computed on a government-wide basis.

Amendment No. 2. This addition provides specific criteria for the court to use in exercising its discretion to award against the government attorney fees and other costs in FOIA litigation where the complainant has substantially prevailed.

Amendment No. 3. The change in subsection (a)(4)(F) would provide for notice and an opportunity to be heard to the federal officers or

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employees responsible for withholding records from public access without any reasonable basis in law. The amendment would also change the nature of the sanction from a monetary penalty to an employment suspension, comparable to that which can presently be imposed on a federal officer or employee under Civil Service regulations.

Amendment No. 4. The change is technical in nature, clarifying application of the exemptions in the subsection to individuals "records" instead of the entire "files."

Amendment No. 5. This amendment applies to all matters within subsection (b) the requirement that nonexempt portions of requested records be enclosed, with portions determined to be exempt from disclosure to be deleted or segregated before disclosure.

Background

Recognition of the people's right to learn what their government is doing through access to government information can be traced back to the early days of our Nation. Open government has been recognized as the best insurance that government is being conducted in the public interest, and the First Amendment reflects the commitment of the Founding Fathers that the public's right to information is basic to the maintenance of a popular form of government. Since the First Amendment protects not only the right of citizens to speak and publish, but also to receive information, freedom of information legislation can be seen as an affirmative congressional effort to give meaningful content to constitutional freedom of expression. Moreover, to exercise effectively all their First Amendment rights, the people must know what their government is doing.

The first congressional attempt to formulate a general statutory plan to assist free access to government information was contained in section 3 of the Administrative Procedure Act, enacted in 1946. This section provided that certain information shall be published "except to the extent that there is included (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency." Soon after this enactment, however, it became clear that despite Congress' original intent to promote disclosure, section 3—along with the federal "housekeeping" statute (5 U.S.C. § 301) allowing each agency head "to prescribe regulations" for "the custody, use, and preservation of records, papers, and property appertaining to" his agency—was becoming widely used as a basis for withholding information.

In 1958 the federal "housekeeping" statute was amended (P.L. 85–619) to provide that it did not authorize withholding information or records from the public. And in 1966 Congress enacted the Freedom of Information Act.

The specific objectives of the FOIA were set out by this committee in its Report on the legislation (S. Rept. No. 813, 89th Congress, 1st Session, October 4, 1965, at 11 (hereinafter *1965 Senate Rept.*)):

> (1) It sets up workable standards for what records should and should not be open to public inspection. In particular, it avoids the use of such vague phrases as "good cause found" and replaces them with specific and limited types of information that may be withheld.

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(2) It eliminates the test of who shall have the right to different information. For the great majority of different records, the public as a whole has a right to know what its Government is doing. There is, of course, a certain need for confidentiality in some aspects of Government operations and these are protected specifically; but outside these limited areas, all citizens have a right to know.

(3) The revised section 3 gives to any aggrieved citizen a remedy in court.

Although the Act was hailed by President Johnson in 1966 as deriving from the essential principle that "a democracy works best when the people have all the information that the security of the Nation permits," many observers at the time recognized the difficulties in administering and interpreting the new law. Courts have since recognized deficiencies in the legislation, and testimony this year before the Subcommittee on Administrative Practice and Procedure has pointed out clearly a number of areas that require congressional action to insure more faithful agency compliance with the law. Witnesses suggested that the act has become a "freedom from information" law, with the curtains of secrecy still tightly drawn around the business of government.

The House Foreign Operations and Government Information Subcommittee held 14 days of oversight hearings in the 92nd Congress relating to administration of the Freedom of Information Act by federal agencies, following which the House Subcommittee identified 6 "major problem areas":

1. The bureaucratic delay in responding to an individual's request for information—major Federal agencies took an average of 33 days with such responses; and when acting upon an appeal from a decision to deny the information, major agencies took an average of 50 additional days;

2. The abuses in fee schedules by some agencies for searching and copying of documents or records requested by individuals; excessive charges for such services have been an effective bureaucratic tool in denying information to individual requestors;

3. The cumbersome and costly legal remedy under the act when persons denied information by an agency choose to invoke the injunctive procedures to obtain access; although the private person has prevailed over the Government bureaucracy a majority of the important cases under the act that have gone to the Federal courts, the time it takes, the investment of many thousands of dollars in attorney fees and court costs, and the advantages to the Government in such cases makes litigation under the act less than feasible in many situations;

4. The lack of involvement in the decisionmaking process by public information officials when information is denied to an individual making a request under the act; most agencies provide for little or no input from public information specialists and the key decisions are made by political appointees—general counsels, assistant secretaries, or other top-echelon officials;

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> 5. The relative lack of utilization of the act by the news media, which had been among the strongest backers of the freedom of information legislation prior to its enactment; the time factor is a significant reason because of the more urgent need for information by the media to meet news deadlines. The delaying tactics of the Federal bureaucrats are a major deterrent to more widespread use of the act, although the subcommittee did receive testimony from several reporters and editors who have taken cases to court and eventually won out over the secrecy-minded Government bureaucracy; and
>
> 6. The lack of priority given by top-level administrators to the full implementation and proper enforcement of Freedom of Information Act policies and regulations; a more positive attitude in support of "open access" from the top administrative officials is needed throughout the executive branch. In too many cases, information is withheld, overclassified, or otherwise hidden from the public to avoid administrative mistakes, waste of funds, or political embarrassment. (H.R. Rept. No. 92–1419, Administration of the Freedom of Information Act. Committee on Government Operations, p. 8 (hereinafter cited *House Report*).)

In March 1973 legislation was introduced in the House and Senate, reflecting the findings and recommendations of the *House Report*, which proposed a number of procedural and substantive changes in the law. These bills (S. 1142 and H.R. 5425) were the subject of hearings in both Houses of Congress. Discussion thus moved from identifying problems of administering the FOIA to developing appropriate remedial legislation.

During the spring of 1973, three Senate subcommittees joined together to take an intensive look at various aspects of government secrecy, including freedom of information, executive privilege, and the classification system. The three subcommittees were the Subcommittee on Administrative Practice and Procedure, chaired by Senator Edward M. Kennedy; the Subcommittee on Separation of Powers, chaired by Senator Sam Ervin; and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, chaired by Senator Edmund S. Muskie. The subcommittees conducted 11 days of hearings, heard from over 40 witnesses, and amassed over 850 pages of record.*

Seven of the 11 days of joint hearings were devoted to issues involving the Freedom of Information Act. Witnesses representing the media (National Newspaper Association, Radio-Television News Directors Association, the New York Times, Joint Media Committee and Sigma Delta Chi), the bar (American Bar Association), public interest groups (Center for Study of Responsive Law, Common Cause, American Civil Liberties Union, Consumers Union), government agencies (Department of Agriculture, Department of Defense,

*Hearings before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations and the Subcommittees on Separation of Powers and Administrative Practice and Procedure of the Committee on the Judiciary, vol. I (April 10, 11, 12, May 8, 9, 10, and 16, 1973), and vol. II (June 7, 8, 11, and 26, 1973). Witnesses testified on the FOIA proposals on April 11, 12, May 9, June 7, 8, 11, and 26. References to testimony are cited hereinafter as *Hearings*. Volume III contains secondary materials related to the issues considered in the hearings. Agency reports on S. 1142 are collected in *Hearings*, vol. II at 280–325.

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Department of Justice), and labor (Oil, Chemical and Atomic Workers International Union), together with members of Congress (Senator Chiles, Congressman Moorhead, Congresswoman Mink) and practicing attorneys, analyzed the shortcomings of the present law and proposed varying solutions. Reports on legislative proposals were received from 23 government agencies, and additional views were received from interested parties. S. 2543 reflects, in addition to the views expressed at the public hearings, extensive analysis of the agency practices and of the court decisions under the FOIA.

In 1966 President Johnson, upon signing the FOIA into law, said "I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded." When President Nixon issued a new Executive Order in 1972 governing classification and declassification of government information he observed:

> Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies. (*Fed. Reg.*, vol. 37, No. 48, March 10, 1972, p. 5209)

In the past year events have clearly demonstrated that government secrecy can breed government deceit, nurture executive arrogance, and cover political embarrassment. "If we are to learn from the debacle we are in," said retired Chief Justice Earl Warren recently, "we should first strike at secrecy in government wherever it exists, because it is the incubator for corruption."

In introducing S. 2543, the bill's sponsor, Senator Kennedy, observed that "secret government too easily advances narrow interests at the expense of the public interest," and re-emphasized the importance to democracy of a free flow of information from the government to the public:

> We should keep in mind that it does not take marching armies to end republics. Superior firepower may preserve tyrannies, but it is not necessary to create them. If the people of a democratic nation do not know the basis on which those decisions are being made, then their rights as a free people may gradually slip away, silently stolen when decisions which affect their lives are made under the cover of secrecy.

Explanation

The Freedom of Information Act was enacted in July 1966, became effective in July 1967, and was codified in June 1967 as section 552 of title 5, United States Code. The Act contains 3 basic subsections. The first (§ 552(a)) sets out the affirmative obligation of each agency of the federal government to make information available to the public, with certain information required to be published and other information merely required to be made available for public inspection or copying. This subsection contains remedies for noncompliance; no person may be adversely affected by any matter (*e.g.* regulations, policies,

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decisions) required to be published and not so published, and any person improperly denied information requested or required to be published under the section may go to court to require its production.

The second subsection of the FOIA (§ 552(b)) contains the so-called "exemptions" to the general rule of mandatory disclosure contained in the previous subsection. These relate to matters that are:

(1) Specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy;

(2) Related solely to the internal personnel rules and practices of and agency;

(3) Specifically exempted from disclosure by statute;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) Contained in or related to examination, operating or condition reports prepared by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they are only *permissive*. They merely mark the outer limits of information that *may* be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate—as well as that the intent of the exemption relied on allows—that the information *should* be withheld. The Attorney General reemphasized the point in his memorandum explaining the FOIA to government agencies:

> Agencies should also keep in mind that in some instances the public interest may best be served by disclosing, to the extent permitted by other laws, documents which they would be authorized to withhold under the exemptions. (Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June 1967, at 2–3 (hereinafter cited as *A. G. Memorandum*).)

A number of agencies have by regulation adopted this position that, notwithstanding applicability of an FOIA exemption, records must be disclosed where there is no compelling reason for withholding. (*E.g.*, Interior—43 C.F.R. § 22; HEW—45 C.F.R. § 5.70; HUD—24 C.F.R. § 15.21; DOT—49 C.F.R. § 7.51.) This approach was clearly intended by Congress in passing the FOIA.

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Finally, the third subsection (§ 552(c)) provides that the FOIA authorizes only the withholding "specifically stated" and that it "is not authority to withhold information from Congress."

One commentator has observed that the legislative history of the Freedom of Information Act "is even more confusing than the act itself." (Freedom of Information Act: Access to Law, 36 *Fordham L. Rev.* 756, 767 (1968).) In the first commentary on the FOIA, Professor Kenneth Davis pointed to numerous ambiguities and inconsistencies in the language of the new law and the committee reports on it, and courts have subsequently grappled with this language. (Davis, Information Act: A Preliminary Analysis, 34 *Chicago L. Rev.* 761 (1967).) Most of the problems have arisen with regard to the nine exemptions in subsection (b) of the Act, and a variety of proposals to amend the language of the exemptions was considered by the committee. Some witnesses at subcommittee hearings proposed the complete elimination of certain exemptions, while others advocated expanding the areas in which information may be withheld from disclosure.

The risk that newly drawn exemptions might increase rather than lessen confusion in interpretation of the FOIA, and the increasing acceptance by courts of interpretations of the exemptions favoring the public disclosure originally intended by Congress, strongly militated against substantive amendments to the language of the exemptions. All federal agencies have promulgated regulations under the FOIA, many of which attempt to clarify the meaning of the exemptions, and there have been over 200 court cases involving the Act. From these cases has grown a full body of case law, resolving ambiguities and settling upon interpretations generally consistent with the spirit of disclosure reflected by the passage of the FOIA and with the specific intent of Congress in drafting the law. The substance of the exemptions contained in the Freedom of Information Act thus remains unchanged by S. 2543, although by leaving it unchanged the committee is implying acceptance of neither agency objections to the specific changes proposed in the bills being considered, nor judicial decisions which unduly constrict the application of the Act.

S. 2543 does, however, make procedural changes in the statute. Many of these procedural changes were opposed by federal agencies in their testimony before the subcommittee and reports on similar legislative proposals. The recurring reasons for opposition can easily be summarized: changes of any kind which would promote faster, freer public access to federal records are going to be costly, burdensome, and inflexible to administer.

The committee recognizes that procedural requirements of any kind are subject to these criticisms. For instance, affording due process of law to criminal defendants is inevitably going to add to governmental costs and burdens in criminal prosecutions, but the Bill of Rights clearly resolves the conflict between administrative convenience and individual rights in favor of the latter. By the same token, in 1966 Congress faced the problem of balancing the interest of the government in keeping some matters confidential and in maintaining administrative efficiency with the interest of the public in free access to government information. As this committee observed at that time, "Success lies in providing a workable formula which encompasses,

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balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." (*1965 Senate Rept.* at 3.) The Freedom of Information Act embodied what the Congress believed to be a workable formula. The committee likewise presently believes that S. 2543 reflects the same balancing process, emphasing the public's need for speedier, freer access to information without unduly burdening agencies.

It should be remembered that the agencies and officials of the executive branch uniformly opposed the Administrative Procedure Act in the 1940's and the Freedom of Information Act in the 1960's. But on each occasion Congress concluded that administrative due process and public access to information outweighed administrative inconvenience, and laws were passed accordingly.

As an illustration: In its report on proposed Freedom of Information legislation in 1965, the Defense Department stated that in order to comply with the public information requirements (which were to become the FOIA provisions), it would be necessary in each component of the Department of Defense to build a large staff whose duty would be to determine the availability of records and information, to facilitate its collection from a variety of storage sites, and to assist in defending against suits in U.S. district courts anywhere in the United States. Such an organizational requirement would be exceedingly costly. (See Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, 89th Cong., 1st Sess. on S. 1160, etc., May 12, 13, 14 and 21, 1965, at 412.)

Yet in responding to a question concerning the situation at DOD since passage of the FOIA, a departmental representative replied that "the net effect has been beneficial." (*Hearings*, vol. II at 88.) Similar statements concerning benefits derived from the FOIA have been made by officials of other agencies, notably the FTC, FDA, and EPA. It is expected that despite the possible additional burdens and marginal added costs which S. 2543 may place on federal agencies in carrying out their public information responsibilities, the net effect will be beneficial.

Publication of Indices

Subsection 1(b) of S. 2543 is designed to provide greater accessibility to each agency's index. The index provides identifying information for the public regarding matters issued, adopted, or promulgated by the agency and required to be made public by section 522 (a) (2) of the Freedom of Information Act. This requirement is neither overly burdensome nor expensive, but it should provide the public—especially through institutions and libraries—with more readily available access to what its government is doing. As the Common Cause spokesman told the Subcommittee, "If the existence of a document is unknown, disclosure of its contents will never be requested." (*Hearings*, vol. I at 140.)

A publication requirement should also encourage agencies to maintain their indices in a current manner. Some agencies, like the Federal Communications Commission, are already in compliance with this requirement and have experienced no apparent problems in this regard. (*Hearings*, vol. II at 300.)

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Some agencies (*e.g.*, Railroad Retirement Board, Small Business Administration) questioned whether there was sufficient interest in their indices to justify mass routine publication. The committee believes that photocopy reproduction of indices will constitute adequate "publication" for those agencies for whom there is insufficient interest in their indices to justify printing. The cost, if any, of such photocopied indices should, however, reflect not the actual cost of reproduction but the equivalent per-item cost were the indices printed in quantity.

To avoid possible problems in interpreting a requirement that such indices be "currently" published, the new publication requirement would require only a "quarterly or more frequently" publication of these indices—a modification adopted from a suggestion of the Federal Power Commission. (*Hearings*, vol. II at 312.) Publication of supplements rather than republication of the entire index would fulfill this requirement. Publication by a commercial service, such as the Commerce Clearing House, Prentice-Hall, or the Bureau of National Affairs, would fulfill the requirements of this section. Duplicative publication would serve no useful purpose and is certainly not intended by the provision, but in instances where agencies rely on commercial services, those agencies would be expected to maintain the commercial services at the agency offices and to make them available for public inspection.

Revision of Subsection (a)(3)

Subsection 1(b) of S. 2543 contains a number of amendments to subsection (a)(3) of the Freedom of Information Act (5 U.S.C. § 552(a)(3)). Subsection (a)(3) has been divided into two parts with the elements of each placed in separate subparts. This is intended not only for clarity but to emphasize the original intent of Congress in enacting subsection (a)(3)—that the judicial review provisions apply to requests for information under subsections (a)(1) and (a)(2) of section 552, as well as under subsection (b).

On occasion, the Department of Justice has argued in litigation that judicial review of a denial of information requested under subsections (a)(1) and (a)(2) was not available under the FOIA, but courts have uniformly rejected this argument. (See, *e.g.*, *American Mail Line, Ltd.* v. *Gulick*, 411 F.2d 696, 701 (1969): "Congressional intent (although not spelled out directly anywhere) seems to have been that judicial review would be available for a violation of any part of the Act, not merely for subsection (3).") In one remarkable instance, the government even contended that an "agency determination that material sought falls within one of the nine exemptions" in subsection (b) "precludes the broad judicial review provided by subsection (a)(3)." (*Epstein* v. *Resor*, 421 F.2d 930, 932 (1970).) This contention was properly rejected by the court.

The restructuring of subsection (a)(3) should lay this issue to rest, making it clear that de novo judicial review is available to challenge agency withholding under any provision in section 552.

Identifiable Records

Presently the provisions of the Freedom of Information Act are predicated upon "a request for identifiable records" (section 552(a)(3)). S. 2543 would change this language to refer simply to a "request

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for records which reasonably describes such records." This change again reflects the intent of the original drafters of the FOIA, for in explaining the term "identifiable," the 1965 Senate Report on the Act said:

> The records must be identifiable by the person requesting them, i.e., a reasonable description enabling the Government ployee to locate the requested records. (*1669 Senate* Rept. at 8.)

While many agencies view this language as the presently operative interpretation of the "identifiable" requirement, cases nonetheless have continued to arise where courts have felt called upon to chide the government for attempting to use the identification requirement as an excuse for withholding documents. (*Bristol-Myers Co.* v. *FTC*, 424 F.2d 935 (D.C. Cir. 1970); *National Cable Television Ass'n* v. *FCC*, 479 F.2d 183 (D.C. Cir. 1973).) In one case the government had the temerity to argue that the request being resisted was not for "identifiable" records, even though the court specifically found that the agency in question had known all along precisely what records were being requested. (*Legal Aid Society of Alameda Cnty.* v. *Schultz*, 349 F. Supp. 771, 778 (N.D. Cal. 1972.)

While the committee does not intend by this change to authorize broad categorical requests where it is impossible for the agency reasonably to determine what is sought, it nonetheless believes that the identification standard in the FOIA should not be used to obstruct public access to agency records. Agencies should continue to keep in mind, as specified in the *A. G. Memorandum* (p. 24), that "their superior knowledge of the contents of their files should be used to further the philosophy of the act by facilitating, rather than hindering, the handling of requests for records."

Subsection (b)(1) of S. 2543 makes explicit the liberal standard for identification that Congress intended and that courts have adopted, and should thus create no new problems of interpretation.

Search and Copy Fees

S. 2543 would add a new subsection (4)(A) to section 552(a) requiring the Office of Management and Budget to promulgate regulations specifying a uniform schedule of fees applicable to all FOIA requests, and setting out criteria for reduction or waiver of the fee.

Section 552(a)(3) of the FOIA provided that agencies could by published rules set "fees to the extent authorized by statute" for service performed in complying with FOIA requests—that is, for searching and copying requested documents. 5 U.S.C. § 483(a) authorizes agencies to charge fees, as the agency head determines to be "fair and equitable." As set out in Circular No. A–25 of the Office of Management and Budget concerning "User Charges," "where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service." (*Hearings*, vol. III at 469.) The circular outlines broad guidelines to be used in determining the costs to be recovered, and agencies have followed by setting fee schedules for search and copying in response to FOIA requests.

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The 1972 *House Report* observed the "real possibility that search fees and copying charges may be used by an agency to effectively deny for exemption under subsection (b) of the act," and witnesses before the subcommittee illustrated this observation.

Mr. Harding Bancroft reported a demand that the N.Y. Times guarantee fees to search for documents that might not be released even when found, and observed that the Times finally paid for search and copying of documents that turned out to be classified European newspaper clippings. (*Hearings*, vol. I at 160.)

Mr. Harrison Wellford suggested that fees "have become toll gates on public access to information." He described how he had been put in a "Catch-22" situation by the Department of Agriculture:

> The only way I could make my request specific was to get access to the indexes by which those files were recorded. When I asked for access to the indexes, I was told they were internal memoranda, and not available to me. Therefore, I had to make my request in a broad fashion and they came back with a bill for $85,000 which we regretfully had to turn down. (*Hearings*, vol. II at 97.)

Mr. Wellford also told of receiving "frequent complaints from citizens who have been charged search fees and xeroxing costs for information which an agency made freely available to its regularly clients." (*Hearings*, vol. II at 103.)

Finally, Mr. Ronald Plesser indicated that in one instance FDA asked a requestor to make a prepayment for $20,000 just for a preliminary search without even knowing which documents existed. (*Hearings*, vol. I at 205.)

The Administrative Conference of the United States conducted a study on agency implementation of the FOIA and found that copying charges ran from 5 cents a page at the Department of Agriculture to $1 a page at the Selective Service System, while clerical search charges varied from $3 an hour at the Veterans' Administartion to $7 an hour at the Renegotiation Board. Similar variations were found in a study submitted to the Subcommittee by Mr. Ronald Plesser. (*Hearings*, vol. I at 205.)

The Administrative Conference, in a formal recommendation, proposed that a fair and equitable fee schedule be established by each agency. "To assist agencies in this endeavor," the Administrative Conference recommended establishing a committee which was to include representatives of the Office of Management and Budget, the Department of Justice, and the General Services Administration. The Office of Management and Budget was prompted by this recommendation to initiate a study of the possibility of uniform charges under the Freedom of Information Act, but this study was dropped before completion and no further action on this matter has been undertaken. (*Hearings*, vol. I at 204–6; vol. II at 97.)

S. 2543 proposes that the fee schedule to be set "shall be limited to reasonable standard charges for document search and duplication." This standard would provide a ceiling and prevent agencies from using fees as barriers to the disclosure of information which should otherwise be forthcoming. Under this standard, and with the provisions for waiver and reduction of fees, it is not necessary that FOIA services

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performed by agencies be self-sustaining. Recovery of only direct costs would be provided for search and copying, while no costs would be assessed for professional review of the requested documents if necessitated. Proposals have been advanced that fees by agencies for FOIA services performed be allocated to the agency receiving them and not treated as general revenue. The committee believes that this could unduly encourage the charging of excessive fees by agencies, effectively taxing public access even more. Since the fees will not go to the agency involved, the fee charged need not directly relate to the agency's actual costs, nor should the public pay more when dealing with an inefficient agency.

Finally, S. 2543 allows documents to be furnished without charge or at a reduced charge where the public interest is best served thereby. This public-interest standard should be liberally construed by the agencies; it is borrowed from regulations in effect at the Departments of Transportation and Justice. In addition to establishing the general rules, the amendment specifies that fees shall ordinarily not be charged whenever the person requesting the records is indigent, when the aggregate fee would amount to less than $3, when the records requested are not found, or when the records located are withheld.

Venue

S. 2543 would establish venue in the District of Columbia concurrent with that already set forth in the Freedom of Information Act "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated."

A number of present federal statutes provide for exclusive venue in the United States District Court for the District of Columbia (Voting Rights Act, 42 U.S.C. § 1973(c)) or in the D.C. Circuit Court of Appeals (FCC Orders, 47 U.S.C. § 402(b); Clean Air Act of 1970, 42 U.S.C. § 1857 (h)—5(b)(1); Noise Control Act of 1972, 42 U.S.C. § 4915(a)). Others provide for alternate or concurrent venue in the District of Columbia federal courts. (Consumer Product Safety Act of 1972, 15 U.S.C. § 2060 (a); Hobbs Act, 28 U.S.C. § 2343; review of FCC orders—15 U.S.C. 717 (r). NLRB—29 U.S.C. § 160(f), SEC—15 U.S.C. §§ 77(i), 78(y), CAB—49 U.S.C. § 1486(b).) Over one-third of reported FOIA cases have thus far been brought in the District of Columbia, and the courts of that district have gained substantial expertise in this area. Since attorneys in the Justice Department in Washington, D.C. will have been involved in initial FOIA determinations at the administrative level (*Hearings*, vol II at 217; 38 Fed. Reg. 19123, July 18, 1973), defense of litigation in the District of Columbia would be more convenient from the government's vantage point.

District of Columbia venue would not be exclusive but only as an alternative, at the complainant's option. Concurrent venue will remain where he resides or has his business or where the agency records are situated.

Expedition on Appeal

The Freedom of Information Act presently provides that proceedings brought under the Act in the district court shall "take precedence on the docket" and "be expedited in every way." (5 U.S.C. § 552(a)(3).) While the D.C. Circuit Court of Appeals has adopted this man-

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date and has usually given appeals of FOIA cases precedence, other circuits have apparently not yet followed suit. S. 2543 would make this practice of expediting FOIA cases on appeal as well as in the trial court uniform throughout the federal courts of appeals, reflecting congressional intent to have FOIA cases decided with the least possible delay.

One example of extraordinary delay which came to the committee's attention involved the case of *Morgan* v. *FDA* (D.C. Cir. No. 17–1709), where the plaintiff sued to obtain FDA disclosure of certain clinical and toxilogical tests submitted to the agency in connection with applications for approval of new drugs. The appeal was docketed September 2, 1971; Appellants reply brief was filed September 28, 1972; the case was argued February 22, 1973; and as of January 1974 no decisioin had been handed down. While one of first impression, this case has far-reaching implications for both the public and the drug industry, as well as for the agency, and the FDA has postponed finalizing new FOIA regulations pending a final decision in the case.

It should be noted that expedition of FOIA cases on appeal as well as at the trial level may well work to the advantage of the government. For the United States Court of Appeals for the District of Columbia Circuit held in one case that the FOIA confers jurisdiction on the courts "to enjoin administrative proceedings pending a judicial determination of the applicability of the Information Act to documents involved in those proceedings. (*Bannercraft Clothing Co.* v. *Renegotiation Board*, 466 F. 2d 435, 349 (1972), cert. granted). Thus additional delays in related administrative proceedings may be avoided by expedition of judicial determinations in FOIA cases.

In Camera Inspection and De Novo Review

Presently when most Freedom of Information Act cases reach the federal district courts, the judge has authority to examine the requested documents in order to ascertain the propriety of agency withholding. This procedure has not, however, been held to apply to records withheld under the first exemption of the Act—subsection 552(b)(1). In *Environmental Protection Agency* v. *Mink* (410 U.S. 73 (1973)) Congresswoman Patsy Mink attempted to obtain documents relating to the projected effect of the underground atomic test at Amchitka from the Environmental Protection Agency. The Supreme Court held that in all cases *except* those dealing with information which is claimed to be specifically required by executive order to be kept secret in the interest of national defense and foreign policy, de novo review by the district court—as provided for in the FOIA—allows an incamera inspection of the records requested. The Court ruled that in that inspection, the court is to determine whether claimed exemptions apply in fact and whether non-exempt materials can be severed from exempt materials and be released.

While legislative proposals have been made to require automatic in camera examination of disputed records in every case, the Supreme Court observed:

> Plainly, in some situations, in camera inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed

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> affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material [not exempt from disclosure]. The burden is, of course, on the agency resisting disclosure, 5 USC § 552(a)(3), and if it fails to meet its burden without *in camera* inspection, the District Court may order such inspection. (410 U.S. at 93.)

Thus to the extent that a judge can rule on the government's claim that material requested is exempt from disclosure under the FOIA *without* an in camera inspection of that material, such as examination is not mandated. This approach was preferred by the Attorney General in his testimony. (*Hearings*, vol. II at 218.)

There is, of course, an inherent disadvantage placed upon the complainant when material is submitted for in camera examination, since the court's decision will not be the product of an adversary process. Private attorneys with experience in litigating FOIA suits have emphasized this disadvantage. One testified that in one case an agreement was reached where he was permitted full access to Treasury Department files under an agreement that only information ultimately ordered disclosed by the court would be publicly revealed. (*Hearings*, vol. II at 117.) Another indicated that in every FOIA case he filed he requested the court to require the government to file a memorandum explaining why withheld materials were exempt, so that he could respond to the explanation. (*Hearings*, vol. II at 100.) These types of procedures providing for the utilization of the adversary process is in camera proceedings are to be encouraged whenever possible. (See *Hearings*, vol. II at 127, 142.)

On August 20, 1973, the D.C. Circuit Court of Appeals observed that in cases in which in camera examination is warranted:

> It is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought. . . . In a very real sense, only one side of the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information. . . .
>
> The present method of resolving FOIA disputes actually encourages the Government to contend that large masses of information are exempt, when in fact part of the information should be disclosed. (*Vaughn* v. *Rosen*, No. 73–1039 (D.C. Cir., Aug. 20, 1973), Slip op. at 8.)

The court ordered that, in those situations calling for in camera inspection, the government must provide a detailed analysis of the withheld information and the justifications for withholding them, and must formulate a system of itemizing and indexing those documents that would correlate statements by the government with the actual portions of each document. The committee supports this approach which, with the use of a special master where voluminous material is involved, was intended by the court to "sharply stimulate what must be in the final analysis the simplest and most effective solution—for agencies voluntarily to disclose as much information as possible and

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to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt." (*Vaughn* v. *Rosen*, No. 73–1039 (D.C. Cir., Aug. 20, 1973), slip op. at 17.)

One proposal considered by the committee (in S. 1142) would have *required* in camera inspection of records in FOIA cases. While the court should be able to require submission of documents for in camera inspection when it determines such procedure to be desirable and appropriate, the court should also, in the testimony of the American Bar Association spokesman John Miller, "be enabled to reach a decision with respect to whether or not a particular record has been lawfully withheld under the Freedom of Information Act in any manner that it chooses, including through the use of affidavits or oral testimony." (*Hearings*, vol. II at 156.)

The Supreme Court in *Mink* held that the FOIA does not permit an attack on the merits of an executive decision to classify information. Since the fact of classification was not in issue, in camera examination could serve no purpose. The practical result of this decision is that in camera inspection of documents withheld under exemption (b)(1) will generally be precluded in cases brought under the FOIA.

S. 2543 would amend the Act to permit such examination, and a fuller discussion of this issue appears below in this Report (page --). On at least two occasions, however, the government has taken the position that the seventh exemption (subsection (b)(7)) relating to disclosure of investigatory files also represents a blanket exemption where in camera inspection is unwarranted and inappropriate under the statute. (*Stern* v. *Richardson*, No. 179-73, D.C. Cir., Sept. 25, 1973; *Weisberg* v. *Department of Justice*, No. 71–1026, D.C. Cir., reargued en banc.) By expressly providing for in camera inspection regardless of the exemption invoked by the government, S. 2543 would make clear the congressional intent—implied but not expressed in the original FOIA—as to the availability of in camera examination in all FOIA cases. This examination would apply not just to the labeling but to the substance of the records involved.

S. 2543 also indicates that the court shall make its determination whether the requested records "or any part thereof may be withheld under any of the exemptions." The spokesman for the American Bar Association suggested in the hearings that "it would also be useful to amend the statute so as to make it clear that agencies are required to separate exempt from non-exempt information in a particular record, and make available the non-exempt information." The committee believes that this requirement is understood in the basic FOIA, and the inclusion of this amendment provides authority for the court during judicial review to undertake such separation if the agency has not. (See also page — below, concerning the government's responsibility to release documents after deletion of segregable exempt portions.)

Assessment of Attorneys' Fees and Costs

S. 2543 would permit the courts to assess reasonable attorneys' fees and other litigation costs against the United States in cases where the complainant has substantially prevailed. Such a provision was seen by many witnesses as crucial to effectuating the original congressional intent that judicial review be available to reverse agency refusals to adhere strictly to the Act's mandates. Too often the barriers presented by court costs and attorneys' fees are insurmountable for the average

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request of information, allowing the government to escape compliance with the law. "If the government had to pay legal fees each time it lost a case," observed one witness, "it would be much more careful to oppose only those areas that it had a strong chance of winning." (*Hearings*, vol. I at 211.)

The obstacle presented by litigation costs can be acute even when the press is involved. As stated by the National Newspaper Association:

> An overriding factor in the failure of our segment of the Press to use the existing Act is the expense connected with litigating FOIA matters in the courts once an agency has decided against making information available. This is probably the most undermining aspect of existing law and severely limits the use of the FOI Act by all media, but especially smaller sized newspapers. The financial expense involved, coupled with the inherent delay in obtaining the information, means that very few community newspapers are ever going to be able to make use of the Act unless changes are initiated by the Committee. (*Hearings*, vol. II at 34.)

The necessity to bear attorneys' fees and court costs can thus present barriers to the effective implementation of national policies expressed by the Congress in legislation. The Supreme Court has recognized the role of statutory allowance of attorneys' fees to plaintiffs in encouraging individuals "to seek judicial relief" for the purpose of "vindicating national policy." (*Northcross* v. *Memphis B. of Education*, 412 U.S. 427 (1973).) In one case involving the nonstatutory award of attorneys' fees, the judge observed that " 'a private attorney general' should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefitted a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential." (*La Raza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Calif. 1972.).) Nonetheless, it is generally held that attorneys' fees may not be awarded against the government absent explicit statutory authority. (See 28 U.S. § 2413; *West Central Mo. Rural Dev. Corp.* v. *Phillips*, 42 U.S.L.W. 2366 (D.D.C., Dec. 21, 1973).)

Congress has established in the FOIA a national policy of disclosure of government information, and the committee finds it appropriate and desirable, in order to effectuate that policy, to provide for the assessment of attorneys' fees against the government where the plaintiff prevails in FOIA litigation. Further, as observed by Senator Thurmond:

> We must insure that the average citizen can take advantage of the law to the same extent as the giant corporations with large legal staffs. Often the average citizen has foregone the legal remedies supplied by the Act because he has had neither the financial nor legal resources to pursue litigation when his Administrative remedies have been exhausted. (*Hearings*, vol. I at 175.)

Even the simplest FOIA case, according to testimony, involves legal expenses of over $1,000. (*Hearings*, vol. I at 211, vol. II at 96.) "Only the most affluent organizations might decide to challenge the Govern-

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ment in courts," said Theodore Koop of the Radio-Television News Directors Association. (*Hearings*, vol. II at 24.)

The bill allows for judicial discretion to determine the reasonableness of the fees requested. Generally, if a complainant has been successful in proving that a government official has wrongfully withheld information, he has acted as a private attorney general in vindicating an important public policy. In such cases it would seem tantamount to a penalty to require the wronged citizen to pay his attorneys' fee to make the government comply with the law. However, the bill specifies four criteria to be considered by the court in exercising its discretion: (1) "The benefit to the public, if any deriving from the case"; (2) "the commercial benefit to the complainant"; (3) "the nature of" the complainant's "interest in the records sought"; and (4) "whether the government's withholding of the records sought had a reasonable basis in law."

Under the first criterion a court would ordinarily award fees, for example, where a newsman was seeking information to be used in a publication or a public interest group was seeking information to further a project benefitting the general public, but it would not award fees if a business was using the FOIA to obtain data relating to a competitor or as a substitute for discovery in private litigation with the government.

Under the second criterion a court would usually allow recovery of fees where the complainant was indigent or a nonprofit public interest group versus but would not if it was a large corporate interest (or a representative of such an interest). For the purposes of applying this criterion, news interests should not be considered commercial interests.

Under the third criterion a court would generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented, but would not do so if his interest was of a frivolous or purely commercial nature.

Finally, under the fourth criterion a court would not award fees where the government's withholding had a colorable basis in law but would ordinarily award them if the withholding appeared to be merely to avoid embarrassment or to frustrate the requester. Whether the case involved a return to court by the same complainant seeking the same or similar documents a second time should be considered by the court under this criterion.

In the above situations there will seldom be an award of attorneys' fees when the suit is to advance the private commercial interests of the complainant. In these cases there is usually no need to award attorneys' fees to insure that the action will be brought. The private self-interest motive of, and often pecuniary benefit to, the complainant will be sufficient to insure the vindication of the rights given in the FOIA. The court should not ordinarily award fees under this situation unless the government officials have been recalcitrant in their opposition to a valid claim or have been otherwise engaged in obdurate behavior.

It should be noted that the criteria set out in this subsection are intended to provide evidence and direction—not airtight standards—for courts to use in determining awards of fees. Each criterion should be considered independently, so that, for example, newsmen would ordi-

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narily recover fees even where the government's defense had a reasonable basis in law, while corporate interests might recover where the withholding was without such basis.

Courts have assumed inherent equitable powers to award fees and costs to the defendant if a lawsuit is determined to be frivolous and brought for harassment purposes; this principle would continue, as before, to apply to FOIA cases.

Answer Time in Court

Section 1(b)(2) would give the government 20 days to answer in court a complaint which challenged the withholding of information contrary to the Freedom of Information Act. The Act recognizes the importance of the time element to the public seeking information, and requires that FOIA litigation take precedence on court dockets and be expedited. The Act specifies:

> Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way. (5 U.S.C. § 552(a)(3).)

In normal litigation in the federal courts, the defendant is given 20 days to answer the complaint. (Fed. Rules Civ. Proc., Rule 12.) Under present rules, however, the federal government is given 60 days to answer. Although many of the answers in FOIA suits are peremptory, the hearings indicated that the government often obtains extensions beyond the 60-day period and on occasion has taken over twice the time to respond to a complaint. (See *Hearings*, vol. II at 121.)

Before any FOIA case reaches court, the agency from which the records were first requested would already have had time—both initially and in an administrative appeal—to determine the legal and practical implications of its withholding. (Section 1(c) of the bill would provide for two 15-day time periods for the initial agency response and administrative appeal consideration.) One attorney who has participated in FOIA cases, Mr. Peter Schuck, observed that "the legal positions are very clear by the time that the matter emerged from the agency." (*Hearings*, vol. II at 60.) Another FOIA litigator, Mr. Robert Ackerly, agreed:

> The Government does not need 60 days to answer one of these cases. The request has to be made to the agency and an appeal taken. The agency has their file on the case. They shift it to the Department of Justice and an answer can be filed promptly. In addition the Department habitually files a general denial. They don't even need to see the documents. They come in and admit jurisdiction and deny everything else. It is hard to get the case at issue. We do file motions for in-camera inspection but the Government objects to that because they want time to answer.
>
> I think an amendment which would give the Government 20 days, which we all have in litigation is reasonable and would help expedite these considerations by the court. (*Hearings*, vol. II at 109.)

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Furthermore, under an order recently promulgated by the Attorney General, the Justice Department will be consulted before any final denial of a request for information is issued by any agency. (38 Fed. Reg. 19123, July 18, 1973.) Thus the 20-day requirement should not constitute an undue burden on the government. In special circumstances, the court could direct, for good cause, an extension of time beyond 20 days for the government's answer.

Sanction for Violation

There are numerous provisions in federal law containing sanctions against unauthorized disclosure of certain kinds of information to the public. For example, 18 U.S.C. § 1905 makes it a federal crime for government employees to reveal trade secrets. Numerous other laws and regulations prohibit disclosure of financial or medical information, tax returns, census data, or various applications for government assistance. (*E.g.*, 42 U.S.C. § 1306: crime to disclose information in files of Social Security Administration; 18 U.S.C. § 798; crime to disclose classified information; 13 U.S.C. § 214: prohibits census employees from divulging census information; 42 U.S.C. § 2000(e)-5: crime to make information public in violation of Equal Employment Opportunities Act.)

But nowhere in the federal law are there effective sanctions for government employees who violate the law by withholding information. Although general administrative sanctions are available against government employees who violate classification requirements (*e.g.* E.O. 11652, sec. 13; 5 Foreign Aff. Man. § 992.1–4), Congressman Moorhead reported that his investigation of the numerous sanctions against employees for disclosure of classified matter, revealed that "not one case in 2,500 involved discipline for overclassification." (*Hearings*, vol. I at 187.)

The new subsection 552(a)(4)(F) added by S. 2543 includes a procedure for a judicial determination whether the federal employee responsible for wrongfully withholding information from the public has acted without a reasonable basis in law. If the court so determines, it is authorized to order the responsible employee's appropriate supervisor to suspend him between 10 and 60 days. Provisions are included elsewhere in the bill (section 3) for identifying those individuals involved in the decision to withhold information requested under the Act.

Before any civil sanction could be levied against the responsible employee under S. 2543, he must be served with notice and be given an opportunity to appear before the court, and the court must find that his action in withholding the documents in question was "without reasonable basis in law." The committee does not intend this standard to imply that a responsible government employee will be held liable under this section in the ordinary case where, for example, advice of counsel is sought and followed and where there may be a reasonable difference of opinion on application of the law to the material sought. The standard would apply to extraordinary and egregious cases where an official refused to follow the mandates of the law.

The "reasonable basis in law" standard is, as thus explained, neither vague nor uncertain. In fact, it is substantially more specific than language presently in the law and regulations governing the conduct

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of employees and officials of the executive branch. For example, Executive Order 11222, section 202(c) provides that:

> It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection a, which might result in or create the appearance of (1) using public office for private gain; (2) giving preferential treatment to any organization or person; (3) impeding government efficiency or economy; (4) losing complete independence or impartiality of action; (5) making a government decision outside official channels; or (6) affecting adversely the confidence of the public in the integrity of government. (See also 5 C.F.R. § 735.201a.)

Also prohibited by Civil Service Commission Regulations is an employee's engaging in "criminal, infamous, dishonest, immoral or notoriously disgraceful conduct, or other conduct prejudicial to the government." (5 C.F.R. § 735.209.) Surely withholding of information from the public in violation of the FOIA and without any "reasonable basis in law" is more precise and identifiable conduct than "affecting adversely the confidence of the public in the integrity of the government" or engaging in "conduct prejudicial to the government." Under existing law, violation of these prohibitions opens an employee to liability up to permanent dismissal from government service.

The need for statutory incentive against secrecy was spelled out by one witness before the subcommittee:

> One major reason the bureaucratic attitude "when in doubt, withhold" is so entrenched is that it is rooted in legal self-protection. An official is held individually accountable under criminal statutes for releasing trade secrets or other confidential information but faces no sanction at all if he illegally withholds information from the public. (*Hearings*, vol. II at 105.)

Mr. Ralph Nader testified that "The great failure of the Freedom of Information Act has been that it does not hold federal officials accountable for not disclosing information." (*Hearings*, vol. I at 209.) "There is presently no incentive whatever in the act to comply," said another witness. (*Hearings*, vol. II at 59.) Mr. Nader told the subcommittee of an employee of the Office of Economic Opportunity who was suspended because he had released allegedly confidential information. OEO later released that same information when sued under the Freedom of Information Act, but it still refused to lift its suspension of the employee. (*Hearings*, vol. I at 209.)

Mr. Ronald Plesser, referring to this same example, said:

> If the government can suspend or terminate an individual for releasing information, then it must be compelled to bring similar action against an employee for not disclosing public information. Only after federal employees are held accountable for their action under this law will the people's right to know be guaranteed. (*Hearings*, vol. II, at 175.)

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The inclusion of a civil penalty as sanction for violation of the Freedom of Information Act would clearly indicate Congress' commitment to openness, not secrecy, on the part of every officer and employee in the federal government.

A number of states have enacted freedom of information statutes which include penalty provisions for violation of those statutes. Removal from office is provided in two states (Fla. Stat. Ann., ch. 119, sec. 02; Kans. Stat. Ann., sec. 45-203), and others impose fines and even jail terms. A comprehensive list of the relevant state statutory provisions and language is contained in the Appendix. The sanction proposed in S. 2543 is more precise and, in fact, more lenient than these state statutes.

Administrative Deadlines

Section 1(c) would establish time deadlines for the administrative handling of requests for information under the FOIA. It would require the agency to determine within fifteen days after the receipt of any request whether to comply with that request, and would give the agency an additional 15 days to respond to an appeal of its initial denial. With each notification of denial to the requester, the agency would have to outline clearly the subsequent steps that could be taken to challenge the denial.

The study by the Administrative Conference, testimony by government witnesses, and the pattern set by present agency regulations suggest flexibility in responding to requests for information, even where specific time deadlines are set. Proposals by governmental witnesses have been made that this matter be left entirely to each agency's regulations, so that the agency could determine the flexibility and discretion it needed to deal with requests. (*Hearings*, vol. II at 82, 217–18).

Witnesses from the public sector, however, uniformly decried delays in agency responses to requests as being of epidemic proportion, often tending to be tantamount to refusal to provide the information. Media representatives, in particular, identified delay as the major obstacle to use of the FOIA by the press and urged still guidelines for agency responses. (*Hearings*, vol. II at 23, 27). Too often agencies realize that a delay in responding to a press request for records can often moot the story being investigated and will ultimately blunt the reporter's desire to utilize the provisions of the Act: "In the journalistic field, stories that cannot be run when they are newsworthy often cannot be run at all," observed New York Times Vice President Harding Bancroft. "Reluctant officials are all too aware of this." (*Hearings*, vol. I at 162.)

Senator Chiles, testifying before the subcommittee, pointed out the findings of a special Library of Congress study that found:

> That the major Government agencies took an average of 33 days to even respond to a request for public record under the Freedom of Information Act. And an average of 50 days to respond when the initial decision to withhold information was appealed by someone looking for the facts. (*Hearings*, vol. II at 14–15.)

Almost every public witness at the hearings brought out specific examples of inordinate delays encountered following initial requests

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for information. Senator Thurmond observed in his opening statement, "often the lapse of time or unjustified delay renders the information useless." (*Hearings*, vol. I at 176.) And Mr. Ralph Nader told the subcommittee that "Above all else, time delay and the frequent need to use agency appeal procedures make the public's right to know, as established by the Freedom of Information Act, a hollow right." (*Hearings*, vol. I at 210.) And one commentator noted, "delay is the agency's one predictable defense to a request which it doesn't wish to honor." (Elias & Rucker, "Knowledge is Power: Poverty Law and the Freedom of Information Act," Legal Serv. Clearinghouse, May 1972, reprinted in 120 Con. Rec. 5834, Jan. 30, 1974, daily ed.)

Mr. Anthony Mazzocchi, representing the Oil, Chemical and Atomic Workers International Union, placed a compelling perspective on agency delays in responding to requests for information relating to health and safety of workers. He testified:

> Now, a great deal of the time we find not outright refusal, just dilatory tactics being used where we don't hear for many months or they don't answer our request for this information. It is left hanging so to speak. . . . In those cases where we have been successful in securing the [inspector's] report, the average delay from the issuance of the citation to receipt of the report has been 3 months. . . .
>
> Obviously, when dealing with information that is vital to the health of workers, such delays and denials are unconscionable. . . . So to be dilatory on an antitrust action is an inconvenience but to be dilatory where health is concerned may doom an individual to early death. (*Hearings*, vol. II at 67, 69.)

Frequent instances of agencies' failing to follow their own regulations militate against allowing them to govern their own performance. For example, on August 2, 1972, a request was made to the Department of Justice for certain business review letters issued by the Antitrust Division. The initial denial was dated November 24, 1972—over three months after the initial request—from which an appeal was taken to the Attorney General on December 6. Although the requestor filed suit on February 21, 1973, the final agency response was not forthcoming until April 19. That response denied access to the documents under longstanding departmental policy. Thus, a period of over 4 months elapsed before the administrative appeal was decided. (*Hearings*, vol. I at 210; vol. II at 165, 172.) And, ironically, in the interim the Department proposed regulations effective March 1st under which the responsible agency official will respond to any request for information within ten days, and under which the "Attorney General will act upon the appeal within 20 working days." (38 Fed. Reg. 4391, Feb. 14, 1973.)

Mr. John Shattuck, testifying for the American Civil Liberties Union, provided further examples involving requests to the Justice Department:

> In one ACLU case, we made a request by letter to the Justice Department's Internal Security Division. Two months after we requested information by letter we were informed that we had to complete the proper form. After we

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> sent a completed form, more than two additional months elapsed before we were informed that the record we requested did not exist. In another case, involving the United States Parole Board, more than two months passed after we had made several telephone requests for a new set of parole criteria being used by the Board before we were orally informed that we would not receive the criteria. A demand letter was sent to the Board's counsel, threatening suit if we did not receive the information within twenty days. On the twentieth day, the Board's counsel by telephone informed us that he was almost certain we would be provided with a copy, but that he needed a couple of more weeks to clear release with others in the agency. Among the "reasons" given for this delay, the counsel stated that the Department of Justice was having difficulty deciding which office should handle our request, since it did not wish to concede that the Parole Board was an "agency" within the meaning of the Act. (*Hearings*, vol. II at 53.)

Added another witness: "If 'Justice delayed is justice denied,' how much more pernicious is the denial when *Justice* does the delaying." (*Hearings*, vol. II at 63.)

It should be obvious that most persons requesting information from the government are not going to go to court if their requests are not answered within the short time provided in this subsection, if the agency sets forth reasonable grounds for delaying its response. Examples of such cases might be where the records sought are in various locations, where voluminous materials are sought, where some sanitization of files is necessary before release, and where the agency cannot locate the requested materials. In these cases, if the agency appears to be making a good-faith effort to comply with the request, the requester should inevitably bear with the agency until the records are located, compiled, and a decision is reached as to their release. There appear to be no premature suits on record so far, in this respect. As Mr. Robert Ackerly responded to a question whether attorneys will run into court before agencies have been found the records requested:

> That rarely happens. We have made that implied threat to the agencies saying, look, it has been a month or 6 weeks and if we don't get a positive response we will treat it as a denial. But it if you are really interested in getting the information and if you believe that the agency tells you they are trying to locate it, you will work with the agency to try to get the information.
>
> I don't think these suits have been brought for the fun of bringing law suits or for practice. I think most people are sincere in their requests. And we want to get the documents and not litigation.
>
> So I think, I don't know what the agency's experience is but my experience is that we work with the agencies and I have not yet brought a suit without a final denial although I may have one with EPA now because I am losing patience with them. (*Hearings*, vol. II at 112.)

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On the other hand, an agency with records in hand should not be able to use interminable delays to avoid embarrassment, to delay the impact of disclosure, or to wear down and discourage the requester. Therefore, the time limits set in section 1(c) of S. 2543 will mark the exhaustion of administrative remedies, allowing the filing of lawsuits after a specified period of time, even if the agency has not yet reached a determination whether to release the information requested.

For those agencies which believe that 15-day deadlines are simply unworkable, the recent address by Federal Energy Office Administrator William Simon to the National Press Club should be instructive. Despite the extraordinary number of inquiries received by his office, Mr. Simon told journalists:

Within 24 hours of our receiving your requests for information, we will issue an acknowledgement, or grant the request. Within ten working days, I personally guarantee that you will get the information you seek, or have the opportunity to appeal. Appeals will be ruled upon within no more than ten days.

A 10-day limit for the initial response to an information request is also provided by regulation for the Defense Supply Agency. (32 C.F.R. § 1260.6(b)(3).)

The *House Report* observed that "Very few of the agencies make an effort to inform requestors that they can appeal the initial decision. . . . Thus, in most agencies the regulations state that an initial refusal may be appealed to a top official in the agency, but agencies seldom make a point of its appellate procedure in the letters denying the initial request." Section 1(c) of S. 2543 therefore adds to the FOIA the requirement that upon an initial denial of a request for information the agency shall notify the person making the request "of the right of such person to appeal to the head of the agency any adverse determination." Likewise, when a denial is upheld on appeal the agency "shall notify the person making such request of the provisions for judicial review of that determination." Intermediate appeals are not contemplated under S. 2543, nor would the administrative time limitations make such appeals practicable.

During the subcommittee hearings Senator Kennedy proposed that "administrative appeals from information denials not go through the agency initially refusing access, where egos and self-protective instincts remain in full force, but to an independent agency with special expertise." (*Hearings*, vol. II at 2.) A similar suggestion was made by a spokesman for the Consumers Union. (*Id.* at 58.) A form of this proposal was instituted administratively by the Attorney General, when he announced at the hearings:

> I will immediately remind all federal agencies of the Department's standing request that they consult our Freedom of Information Committee before issuing final denials of requests under the Act.
>
> In this connection I will order our litigating divisions not to defend freedom of information lawsuits against the agencies unless the committee has been consulted. And I will instruct the committee to make every possible effort to advance the objective of the fullest responsible disclosure. (*Hearings*, vol. II at 217.)

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This procedure has been written into departmental regulations. (38 Fed. Reg. 19123, July 18, 1973.) The committee supports this step and believes that data should be developed regarding its effectiveness before legislative action is taken to legislate mandatory outside consultation.

Exemption (b)(1)

One change in the exemption language having primarily procedural implications is proposed in section 2(a) of S. 2543: Subsection (b)(1) of section 552 is changed to except from the disclosure provision matters that not only are on their face "specifically required by an Executive Order"—or statute— "to be kept secret in the interest of national defense or foreign policy," but also matters that are in fact found to be within such an executive order or statute. This change is responsive to the invitation of the Supreme Court in the *Mink* case (410 U.S. 732) that Congress clearly state its intentions concerning judicial review and in camera inspection of records claimed exempt by virtue of statute or executive order under section 552(b)(1).

Before January 23, 1973, it was generally believed that the de novo review required in section 552(a)(3) applied to documents withheld under all nine exemptions of the Freedom of Information Act—that is, that documents withheld under any exemption could be examined by a court in camera. But on that day the Supreme Court, in the *Mink* case, ruled 5 to 3 (Justice Rehnquist not participating) that any information specifically classified pursuant to executive order and withheld under section 552(b)(1) is exempt from disclosure whether or not it should have been classified under the relevant standards, and that courts are not entitled to review the propriety of the agency decision to classify the information. Given the extensive abuses of the classification system that have come to light in recent years (see, *e.g.*, Executive Classification of Information, H.R. Rept. 93-221, Committee on Government Operations, 93rd Cong., 1st Sess., May 22, 1973, p. 40) the courts at the least should be vested with authority to review security classification where an agency acted without reasonable grounds to assign a classification to a particular document. The proposed amendment to section 552(b)(1) is designed to give the courts that authority by permitting them to examine the documents in light of the executive order or statute cited to justify withholding.

The Supreme Court indicated that the existing language of exemption (b)(1) does not permit in camera inspection of withheld documents, if classified, even to sift out "nonsecret components." The court then observed:

> Obviously this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored. (410 U.S. at 81.)

In concurring with the majority decision in *Mink*, Justice Potter Stewart stated that Congress "has built into the Freedom of Information Act an exemption that provides no means to question an executive decision to stamp a document 'secret', however cynical, myopic, or even corrupt that decision might have been." He said further that Congress "in enacting section 552(b)(1) chose . . . to decree blind acceptance of executive fiat." (410 U.S. at 95.) As Congresswoman Mink

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observed in her testimony before the subcommittee, "Under the slipshod and illicit procedures devised by the executive to withhold information under the national defense exemption, an army of bureaucrats have been allowed to classify and withhold information at will." (*Hearings*, vol. I at 370.)

New York Times vice president Harding Bancroft put the position of the press thusly:

> It is of fundamental importance that a court have the power to review the contents of records sought by newspaper reporters and that courts not be bound by a security classification placed upon documents up to 30 years ago by a cautious civil servant—let alone a "cynical, myopic, or even corrupt" one. (*Hearings*, vol. I at 162.)

Other witnesses, including Senator Harold Hughes, retired Air Force analyst William Florence, Professor Earl Callen, and Dr. Daniel Ellsberg, also attacked existing practices as harmful both to public knowledge of government policy and to expert inquiry into scientific matters. (*Hearings*, vol. I at 259–68, 285–308, 421–70.) And as Congressman Moorhead said, "In our many days of hearings on classification we saw many cases where the use of the classification stamp was simply ridiculous." (*Id.* at 180.)

Such abuse of security rationales to forestall or prevent disclosure was not the intent of the authors of the FOIA in 1965, and S. 2543 makes it clear that such is not the intent now. The addition of the words "and are in fact covered by such order or statute" to the present language of section 552(b)(1) will necessitate a court to inquire during de novo review not only into the superficial evidence—a "Secret" stamp on a document or set of records—but also into the inherent justification for the use of such a stamp. Thus a government affidavit certifying the classification of material pursuant to executive order will no longer ring the curtain down on an applicant's effort to bring such material to public light.

Some proposals that have been made to amend subsection (b)(1) would require the court to analyze whether the document withheld would, if disclosed, endanger the national defense or interfere with foreign policy. Under this approach, any classification of the document under an executive order or statute would be irrelevant. Congress could leave ultimate classification decisions to the courts, under only a general national-defense or foreign-policy standard, but the committee prefers to rely on de novo judicial review under standards set out in executive orders or statutes.

The courts, in order to determine that the information actually is "covered" by the order or statute, will ordinarily be obliged by S. 2543 to inspect the material in question and, from such an inspection, to determine whether or not the classification was imposed by an official authorized to impose it and in accordance with the standards set forth in the applicable executive order. Moreover, courts facing a (b)(1) exemption claim will have to decide whether or not a classification imposed some time in the past continues to be justified.

A Department of Defense witness told the subcommittee:

> I do not believe that the Department of Defense would object to permitting the judge in some circumstances, rare cir-

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> cumstances, I would hope, to examine such a document should he have reason to believe, grounds to believe, or probable cause to believe, that there may have been an improper classification, but we would think that it would be in the court's interests as well as in the interests of everyone, including the executive branch, not to involve the courts in a wholesale review of classified documents. (*Hearings*, vol. II at 87.)

The American Civil Liberities Union spokesman observed on this point:

> I don't think there is a danger the courts will be flooded with litigation. To the contrary, what this statute would do, I think, together with Congress' movement in the classification area in general, would be to place a realistic deterrent on over-classification. Those few litigants who were able to go into court and demonstrate that a document was improperly classified should be entitled to compel its release, but I don't think you will have a flood of persons going in. (*Hearings*, vol. II at 37.)

The committee realizes that such an examination of sensitive, and quite probably, complex material may impose an additional burden on judges. And the committee would expect judges, in such circumstances, to give consideration to any classification review of the material being sought already conducted within the executive branch. An interagency committee to conduct such reviews has been established pursuant to Executive Order 11652 of March 8, 1972, and courts judging the propriety of classification in a given case should be able to accord the deliberations of that committee—to which requests for declassification are supposed to be appealed—appropriate consideration.

It is essential, however, to the proper workings of the Freedom of Information Act that any executive branch review, itself, be reviewable outside the executive branch. And the courts—when necessary, using special masters or expert consultants of their own choosing to help in such sophisticated determinations—are the only forums now available in which such review can properly be conducted.

The judgments involved may often be delicate and difficult ones, but someone other than interested parties—officials with power to classify and conceal information—must be empowered to make them. It is the committee's conclusion that the courts are qualified to make such judgments. Unless they do, citizens cannot be assured that the system for classifying information is not, as Justice Stewart suggested it could be, "cynical, myopic or even corrupt."

Changing "Files" to "Records"

Section 552(a) of the Freedom of Information Act uses the word "records" when referring to information that must be made available to the public under the Act. Use of the world "files" in clauses (6) and (7) of subsection (b), however, has occasionally led to agency arguments that the exemptions in those clauses apply to entire files, whatever documents may be contained therein. Thus, through including extraneous material in exempt files, the agency might seek to prevent disclosure of that otherwise discloseable material.

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This comingling technique was criticized by witnesses and clearly is sanctioned by neither the language nor the intent of the FOIA. (*Hearings*, vol. I at 180; vol. II at 169–70.) The proposed change in the statute therefore reflects the original intent on this subject, and is consistent with the general view of the *AG Memorandum* (p. 23–24).

The Department of Justice observed that the change from "files" to "records" appears to be

> predicated upon the assumption that agencies may place in "files" documents or records which should not be in those files and which the public should have a right to know about. Although we are not aware of any incident in which this has actually happened, we agree that the existing exemption should be interpreted along the lines of the proposed amendment and that records which would not otherwise be exempt should not be withheld merely because they are contained in a personal file. (*Hearings*, vol. II at 272.)

Federal agency reports on the proposal of S. 1142 to change the word "files" to "reports" in clause (6) of section 552(b) reflected support or nonopposition to this change. The change in clause (7) conforms that clause with the rest of the Act.

Deletion of Segregable Portions of Record

A new paragraph is proposed to be added to section 552(b) requiring that where only a portion of a record is determined to be exempt from disclosure, the record must be disclosed with the exempt portion deleted. The direction expressed by the paragraph is consistent with one of the recommendations of the Administration Conference and with court interpretations of the FOIA.

"It is a violation of the Act to withhold documents on the ground that parts are exempt and parts nonexempt." In that event, "suitable deletion may be made," observed one court. (*Welford* v. *Hardin*, 315 F. Supp. 768, 770 (D.D.C. 1970). "The statutory history does not indicate . . . that Congress intended to exempt an entire document merely because it contained some confidential information," said another. (*Grumman Aircraft Engineering Corp.* v. *Renegotiation Bd.*, 425 F. 2d 578, 580 (D.C. Cir 1970).) And again: "The court may well conclude that portions of the requested material are protected, and it may be that identifying details or secret matters can be deleted from a document to render it subject to disclosure." (*Bristol Meyers Co.* v. *FTC*, 424 F.2d 935, 939 (D.D.C. 1968.).

Some agency regulations also require severability of exempt information. For example, HEW regulations provide:

> In the event that any record contains both information which is discloseable and that which is not discloseable under this regulation, the undiscloseable information will be deleted and the balance of the record disclosed. (38 Fed. Reg. 22232, Aug. 17, 1973.)

Under HEW's regulations "Disclosure will be made whether or not the balance of the record is intelligible." (*Id.* at 22231.) This same approach should be taken under the language of the new amendment.

In light of this new provision, and the change of the word "files" to "records" in the subsection, courts will have to look beneath the

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label on a file or record when the withholding of information is challenged. Courts have already held that where intra-agency memoranda are requested, opinion must be severed from purely factual material, with the latter being discloseable. (*Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 89, 91 (1973).)

The FOIA itself directs that "To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details" when it makes information public. (§ 552 (a)(2); see *Rose* v. *Department of the Air Force*, — F. Supp. — (S.D.N.Y. 1972). So also where investigative files are involved will courts have to examine the records themselves and require disclosure of portions to which the purposes of the exemption (§ 552(b)(7)) does not apply.

This provision would apply if, for example, there were a request for a record that had been opened in the course of an investigation that had long since been closed, but which file contained the name of an informer or raw data on innocent persons or confidential investigative techniques. Section 2(b) emphasizes what is presently understood by most courts but has gone unheeded by agencies; it would not be enough for the government to refuse disclosure of the record merely because it contained such exempt information, since deletion of that information would provide full protection for the purposes to be served by the exemption. Thus, the government could not refuse to disclose the requested records merely because it finds in those records some portions which may be exempt.

The language originally proposed in S. 2543 as introduced provided that "if the deletion of names or other identifying characteristics of individuals would prevent an inhibition of informers, agents, or other sources of investigatory or intelligence information, then records otherwise exempt under clauses (1) and (7) of this subsection, unless exempt for some other reason under this subsection, shall be made available with such deletions." The amended language is intended to encompass the scope of this original proposal but apply the deletion principle to all exemptions.

Reporting Requirements

Section 3 of S. 2543 contains certain reporting provisions designed to facilitate congressional oversight of agency administration of the Freedom of Information Act.

A number of witnesses at the hearings indicated that a primary problem with agency compliance with the FOIA is the absence of significant continuing pressures towards liberal disclosure of information. At the same time there is a tendency for bureaucratic self-preservation that strongly supports oversecrecy. Almost all witnesses suggested the importance of congressional oversight in keeping agencies in compliance with the directions of the FOIA.

Periodically, but irregularly, over the past six years the Subcommittee on Administrative Practice and Procedure has asked for reports by agencies on denials of information under the FOIA. (*E.g.*, The Freedom of Information Act: Ten Months Review, Senate Subcommittee on Administrative Practice and Procedure, May 1968.) The committee believes that the collection and analysis of these reports, providing the occasion for the Congress to identify recalcitrant agen-

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cies, recurring misinterpretations of the mandates of the FOIA, and undue delays can go a long way toward encouraging adherence to the Act. The committee thus concludes that reporting should be regularized.

A requirement that the government officials involved in denying FOIA requests should be identified on the record is included in section 3. This was proposed at the hearings by Senator Kennedy, who suggested

> that every Government official involved in deliberations leading to a denial of information be identified on the public record. Just as the proposed legislation's requirement that denials be collected allows for an assessment of an agency's responsiveness to Freedom of Information Act requests, so also should the track record of each individual official at every level be open to public evaluation. (*Hearings*, vol. II at 2.)

The reporting requirement also implies a specific role that the Justice Department should play in monitoring and encouraging agency compliance with the FOIA by requiring the Attorney General to submit an annual report including "a listing of the number of cases arising" under the FOIA, "the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed."

In testimony before the subcommittee the Attorney General agreed that "there are some steps that the Justice Department can take immediately to encourage better administration of the act." (*Hearings*, vol. II at 216.) S. 2543 thus requires the Attorney General to include in his report "a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section."

Expanded Definition of Agency

Section 3 expands on the definition of agency as provided in section 551(1) of title 5. That section defines "agency" as "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, territories, or the District of Columbia." This definition has been broadly interpreted by the courts as including "any administrative unit with the substantial independent authority in the exercise of specific functions," which in one case was held to include the Office of Science and Technology. (*Soucie* v. *David*, 44 F.2d 1067, 1073 (1971).)

Nonetheless, the U.S. Postal Service has taken the position that without specific inclusionary language, amendments to the FOIA "would not apply to the Postal Service." (*Hearings*, vol. II at 323.) To assure FOIA application to the Postal Service and the Postal Rate Commission, and also to include publicly funded corporations established under the authority of the United States like the Public Broadcasting Corporation, section 3 incorporates an expanded definition of agency to apply under the FOIA.

Effective Date

The amendments to the Freedom of Information Act contained in S. 2543 are to be become effective on the ninetieth day after the date of enactment.

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Congressional Access to Information

The Freedom of Information Act presently states that the Act shall not be used as "authority to withhold information from Congress." This basically restates the fact that the FOIA, which controls *public access* to government information, has absolutely no effect upon *congressional access* to government information.

As clear as this section may seem, the Act has incredibly been cited in correspondence from federal agencies to congressional committees as a basis for denying certain information to those committees. In recent months both the Internal Revenue Service and the Federal Power Commission have purported to rely on the FOIA to refuse congressional access to information.

Proposals have been made to expand section 552(c) to impose on the executive branch an affirmative obligation to respond to the congressional requests for information. The committee believes that the nonapplicability of the FOIA to Congress cannot be overstated; at the same time, however, the committee prefers to see legislation relating to executive privilege developed independently from any revision of the FOIA. In fact, during the first session of the 93rd Congress the Senate passed legislation (S. 2432, S. Rept. No. 93-612; S. Con. Res. 30, S. Rept. No. 93-613) dealing with executive privilege, making inclusion of provisions relating thereto in S. 2543 unnecessary.

Changes in Existing Law

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

Title 5.—Government Organization and Employees

* * * * * * *

Chapter 5.—Administrative Procedure

* * * * * * *

Subchapter II.—Administrative Procedure

* * * * * * *

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * * * * * *

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

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(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying *and shall publish quarterly or more frequently, and distribute (by sale or otherwise) copies of* a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

[(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person.]

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which reasonably describes such records and which is made in accordance with published rules stating the time, place, fees, and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, the Director of the Office of Management and Budget shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all agencies. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of these items. Documents may be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. But such fees shall ordinarily not be charged whenever—

(i) the person requesting the records is an indigent individual;

(ii) such fees would amount, in the aggregate, for a request or series of related requests, to less than $3;

(iii) the records requested are not found; or

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(iv) the records located are determined by the agency to be exempt from disclosure under subsection (b).

[On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.]

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principle place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall consider the case de novo, with such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within twenty days after the service upon the United States attorney of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.]

(D) Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all causes and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed. In exercising its discretion under this paragraph, the court shall consider the benefit to the public, if any, deriving from the case, the commercial benefit to the complainant and the nature of his interest in the records sought, and whether the government's withholding of the records sought had a reasonable basis in law.

(F) Whenever records are ordered by the court to be made available under this section, the court shall on motion by the complainant find whether the withholding of such records was without reasonable basis in law and which federal officer or employee was responsible for the withholding. Before such findings are made, any officers or employees named in the complainants motion shall be personally served a copy of such motion and shall have 20 days in which to respond

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thereto, and shall be afforded an opportunity to be heard by the court. If such findings are made, the court shall direct that the appropriate official of the agency which employs such responsible officer or employee suspend him without pay for a period of not less than 10 nor more than 60 days.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

[(4)] *(5)* Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(A) determine within fifteen days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(B) make a determination with respect to such appeal within fifteen days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (3) of this subsection.

Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with subparagraph (A) or subparagraph (B) of this paragraph. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of every officer or employee of any agency who participated substantively in the agency's decision to deny such request.

(b) This section does not apply to matters that are—

(1) specifically required by *an* Executive order *or statute* to be kept secret in the interest of [the] national defense or foreign policy *and are in fact covered by such order or statute;*

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical [files] *records* and similar [files] *records* the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

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(7) investigatory [files] *records* compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of those portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Committee on th Judiciary of the Senate and the Committee on Government Operations of the House of Representatives, which shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(5), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names of officers and employees of the agency who participated in denials of records requested under this section, and the number of instances of participation for each;

(4) a copy of every rule made by such agency regarding this section;

(5) the total amount of fees collected by the agency for making records available under this section; and

(6) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(3) (F) and (4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" means any agency defined in section 551(1) of this title, and in addition includes the United States Postal Service, the Postal Rate Commission, and any other authority of the Government of the United States which is a corporation and which receives any appropriated funds.

COST

Passage of S. 2543 would entail some additional cost to the federal government through the imposition of attorneys fees and court costs

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where the complainant substantially prevails in court and where the judge makes such findings on the criteria stated in the new section 552(h)(4)(E) as he deemed requisite to the award of these fees to the complainant.

It is impossible to estimate the cost of this legislation with precision because of the variable factors. Data show that the numbers of FOIA cases decided for the past four years are approximately: 1970—8; 1971—20; 1972—28; 1973—16. (Between 30 and 40 FOIA cases were filed in 1973.) Many of these cases are dismissed on motions or summary judgments. The government, of course, prevails in a number of cases. Some go to the appellate courts for final decision. Many cases involve corporate plaintiffs seeking information relating to negotiations or a competitor. And the government may likely disclose more information to avoid suits in the first place (offsetting the additional suits that may be filed by complainants who previously could not afford to litigate).

Projecting an average of 30–40 cases *decided* in one year, assuming that in every case an indigent public-interest plaintiff substantially prevails (clearly an unwarranted assumption but giving maximum-impact results), and multiplying this by the basic cost involved in a FOIA case—estimated by private attorneys to be $1,000 (see *Hearings*, vol. I at 211, vol. II at 96)—the total maximum projected cost of S. 2543 would be $40,000 per year.

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SECTION-BY-SECTION ANALYSIS OF S. 2543, AS AMENDED

5 U.S.C. Section 552	Proposed Amendment	Comment
§ 552. Public information; agency rules, opinions, orders, records, and proceedings.		
(a) Each agency shall make available to the public information as follows:		
(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—		
(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;		
(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;		

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(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

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SECTION-BY-SECTION ANALYSIS OF S. 2543, AS AMENDED—(continued)

5 U.S.C. Section 552	Proposed Amendment	Comment
(2) Each agency, in accordance with published rules, shall make available for public inspection and copying— (A) final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases; (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and (C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, and agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each	(2) Each agency, in accordance with publiihsed Rules, shall make available for public inspection and copying and shall publish quarterly or more frequently, and distribute (by sale or otherwise) copies of—	The proposed amendment adds the requirement of quarterly publication and also the requirement of distribution.

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agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which reasonably describes such records and which is made in accordance with published rules stating the time, place, fees, and procedures to be followed, shall make the records promptly available to any person.

The proposed amendment states that the request shall "reasonably" describe the records desired. Provisions relating to judicial action are included in a new section.

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Section-by-section analysis of S. 2543, as amended—(continued)

5 U.S.C. Section 552	Proposed Amendment	Comment
United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaint. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.		

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"(4)(A) In order to carry out the provisions of this section, the Director of the Office of Management and Budget shall promulate regulations, pursuant to notice and receipt of pubic comment, specifying a uniform schedule of fees applicable to all agencies. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents may be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. But such fees shall ordinarily not be charged whenever—

"(i) the person requesting the records is an indigent individual;

"(ii) such fees would amount, in the aggregate, for a request or series of related requests, to less than $3;

"(iii) the records requested are not found; or

The proposed amendment concerning fees requires O.M.B. to promulgate a uniform fee schedule. It also specifies certain situations in which fees should not be charged or should be reduced.

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Section-by-section analysis of S. 2543, as amended—(continued)

5 U.S.C. Section 552	Proposed Amendment	Comment
	"(iv) all of the records located are determined by the agency to be exempt from disclosure under subsection (b).	
	"(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall consider the case de novo, with such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.	The proposed amendment is similar to language currently found in 5 U.S.C. sec. 552(a)(3). It provides additionally, however, that the district court of the District of Columbia shall have jurisdiction under the Act. Also, the phrase "with such in camera examination of the requested records as it finds appropriate" is added.
	"(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to	The proposed amendment adds a time limit for the defendant to submit an answer or other pleading.

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any complaint made under this subsection within twenty days after the service upon the United States attorney of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

"(D) Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all causes and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

The proposed amendment specifically covers "appeals."

"(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed. In exercising its discretion under this paragraph, the court shall consider the benefit to the public, if any, deriving from the case, the commercial benefit to the complainant and the nature of his interest in

The proposed amendment expressly permits the assessment of attorney fees and litigation costs.

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Section-by-section analysis of S. 2543, as amended—(continued)

5 U.S.C. Section 552	Proposed Amendment	Comment
	the records sought, and whether the government's withholding of the records sought had a reasnable basis in law.	
	"(F) Whenever records are ordered by the court to be available under this section, the court shall on motion by the complainant decide whether the act of withholding such records was without reasonable basis in law and which federal officer or employee was responsible for the withholding. Before a finding is made, any officers or employees named in the complainant's motion shall be personally served a copy of such motion and shall have 20 days in which to respond thereto, and shall be afforded an opportunity to be heard by the court. If such a finding is made, the court shall direct that the appropriate official of the agency which employs such responsible officer or employee suspend him without pay for a period of not less than 10 nor more than 60 days.	The proposed amendment permits the court after an appropriate hearing, to require sanctions against persons withholding information without reasonable basis in law.

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	"(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.".	The proposed amendment is substantially identical to language found in section (a) (3) of the current law.
(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.		The proposed amendment does not change the present section but it is renumbered as paragraph (5).
	"(6) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall— "(A) determine within fifteen days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and "(B) make a determination with respect to such appeal within fifteen days (excepting Saturdays, Sundays,	The proposed amendment adds a new paragraph setting a fifteen day time limit for agencies to respond to requests for records under the Act, with a fifteen day time limit on administrative appeals.

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Section-by-section analysis of S. 2543, as amended—(continued)

5 U.S.C. Section 552	Proposed Amendment	Comment
	and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (3) of this subsection. Any persons making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with subparagraph (A) or subparagraph (B) of this paragraph. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of every officer or employee of any agency who participated substantively in the agency's decision to deny such request.".	

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(b) This section does not apply to matters that are— (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;	"(1) specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact covered by such order or statute;". (b) Section 552(b) of title 5, United States Code, is amended by striking out "files" in clauses (6) and (7) therein and inserting in lieu thereof "records".	The proposed amendment adds the language "and are in fact covered by such order or statute." The word "records" is substituted for the word "files."
	(c) Section 552(b) of title 5, United States Code, is amended by adding at the end the following: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of those portions which are exempt under this subsection." "(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Committee on the Judiciary of the Senate and the Committee on Government Operations of the House of Representatives, which shall include—	The proposed amendment adds a new sentence after exemption (9) providing that segregable nonexempt portions of a requested file should be released after deletion of exempt portions. The proposed amendment requires agencies to submit a report annually to Congress containing specific information about its operation under the Freedom of Information Act.

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5 U.S.C. Section 552	Proposed Amendment	Comment
	"(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination; "(2) the number of appeals made by persons under subsection (a)(5), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; "(3) the names of officers and employees of the agency who participated in denials of records requested under this section, and the number of instances or participation for each; "(4) a copy of every rule made by such agency regarding this section; "(5) the total amount of fees collected by the agency for making records available under this section; and "(6) such other information as indicates efforts to administer fully this section.	

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The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a breakdown of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(3) (F) and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

"(e) For purposes of this section, the term 'agency' means any agency defined in section 551(1) of this title, and in addition includes the United States Postal Service, The Postal Rate Commission, and by other authority of the Government of the United States which is a corporation and which receives any appropriated funds.".

SEC. 4. The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act.

The proposed amendment provides that agencies defined in 5 U.S.C. sec. 551(1), the United States Postal Service, the Postal Rate Commission, and any other corporate governmental authority receiving appropriated funds are covered by this section.

The proposed amendment specifies that all amendments shall become effective ninety days after the date of enactment.

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APPENDIX

State Statutory Sanctions Against Violation of Freedom of Information Provisions

Alabama.—Code of Alabama, title 41, section 146 (1945). "Any public officer, having charge of any book or record, who shall refuse to allow any person to examine such record free of charge, must, on conviction, be fined not less than fifty dollars."

Arkansas.—Arkansas Statute Annotated, section 12–2807 (1947). "Any person who wilfully and knowingly violates any of the provisions of this Act shall be guilty of a misdemeanor and shall be punished by a fine of not more than $200, or 30 days in jail, or both."

Colorado.—Colorado Revised Statutes, chapter 113, article 2, section 6 (1963). "Any person who wilfully and knowingly violates the provisions of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed one hundred dollars, or by imprisonment in the county jail not to exceed ninety days, or by both such fine and imprisonment."

Florida.—Florida Statute Annotated, chapter 119, section .02 (1972). "Any official who shall violate the provisions of § 119.01 shall be subject to removal or impeachment and in addition shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083."

Illinois.—Illinois Revised Statute, chapter 116, section 43.27, (1972). "Any officer or employee who violates the provisions of Section 3 of this Act is guilty of a Class B misdemeanor."

Indiana.—Burns Indiana Statute Annotated, chapter 6, title 57, section 606 (1970 Supplement). "Any public official of the state, or of any political subdivision thereof, who denies to any citizen the rights guaranteed to such citizen under the provisions of section(s) 3 and 4 of this chapter, . . . shall be guilty of a misdemeanor, and shall, upon conviction thereof, he fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) to which may be added imprisonment in the county jail for a term not to exceed thirty (30) days."

Kansas.—Kansas Statute Annotated, section 45–203 (1957). "Any official who shall violate the provisions of this act shall be subject to removal from office and in addition shall be deemed guilty of a misdemeanor."

Louisiana.—Louisiana Revised Statute, title 44, section 37, (1950). "Any person having custody or control of a public record, who violates any of the provisions of this Chapter, or any person . . . who . . . hinders or attempts to hinder the inspection of any public records declared by this Chapter to be subject to inspection, shall upon first conviction be fined not less than one hundred dollars, and not more

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than one thousand dollars, or shall be imprisoned for not less than one month, nor more than six months. Upon any subsequent conviction he shall be fined not less than two hundred fifty dollars, and not more than two thousand dollars, or imprisoned for not less than two months, nor more than six months, or both."

Maine.—Maine Revised Statute Annotated, title 1, chapter 13, section 406 (1964). "A violation of any of the provisions of this subchapter or the wrongful exclusion of any person or persons from any meetings for which provision is made shall be punishable by a fine of not more than $500 or by imprisonment for less than one year."

Maryland.—Annotated Code of Maryland, article 76A, section 5 (Supplement 1972). "Any person who willfully and knowingly violates the provisions of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed one hundred dollars ($100.00)."

Nebraska.—Revised Statute of Nebraska, chapter 84, section 712.03 (1967). "Any official who shall violate the provisions of sections 84–712 to 84–712.03 shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and shall upon conviction thereof, be fined not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding three months."

Nevada.—Nevada Revised Statutes, title 19, chapter 293, section .010 (1967). "Any officer having the custody of any of the public books and public records described in subsection 1 who refuses any person the right to inspect such books and records as provided in subsection 1 is guilty of a misdemeanor."

New Mexico.—New Mexico Statutes Annotated, 1953, chapter 71, article 5, section 3. "If any officer having the custody of any state, county, school, city or town records in this state shall refuse to any citizen of this state the right to inspect any public records of this state, as provided in this act (71–5–1 to 71–5–3), such officer shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not less than two hundred and fifty dollars ($250.00) nor more than five hundred dollars ($500.00), or be sentenced to not less than sixty (60) days nor more than six (6) months in jail or both such fine and imprisonment for each separate violation."

Ohio.—Ohio Revised Code Annotated, (Page's 1969) section 149.99. "Whoever violates section 149.43 or 149.351 (149.35.1) of the Revised Code shall forfeit not more than one hundred dollars for each offense to the state. The attorney general shall collect the same by civil action."

Tennessee.—Tennessee Code Annotated, title 15, section 306, cumulative supplement 1970. "Any official who shall violate the provisions of §§ 15–304—15–307 shall be deemed guilty of a misdemeanor."

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